85-1229

CASE NO.

Supreme Court, U.S.
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THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1985 TERM

William S. Russell,
William M. Hetherington,
Robert E. Henry,
Daniel J. Houlihan, and
Ronald E. Oswill,

PETITIONERS

-vs-

DEPARTMENT OF TRANSPORTATION, FAA

ON A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

PETITION FOR CERTIORARI

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Questions Presented

1. IS THE STANDARD THE COURT USED TO APPLY SANCTIONS HERE, NAMELY, "BECAUSE THE ARGUMENTS OF PETITIONERS ARE ADEQUATELY MET BY THE PRECEDENTS OF THE LEAD CASES AND/OR ARE PATENTLY FRIVOLOUS IN LIGHT OF THE RECORD BEFORE THE COURT" IMPERMISSABLY VAGUE AND ERRONEOUS?

2. DOES THE IMPOSITION OF SANCTIONS IN THIS CASE CREATE A PRECEDENT WITH SUBSTANTIAL LIKELIHOOD OF CHILLING THE FIRST AMENDMENT RIGHTS OF LITIGANTS AND THE PROFESSIONAL DUTY OF COUNSEL TO ZEALOUSLY ADVOCATE A CLIENT'S CAUSE?

3. DID THE FAA FAIL TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT PETITIONERS WERE PARTICIPATING IN A STRIKE, I.E. THAT PETITIONERS WERE ABSENT FROM WORK VOLUNTARILY AND WITH THE INTENT TO ACT "IN CONCERT" WITH OTHERS?

4. DID THE GENUINE FEAR OF HARM ON THE PART OF PETITIONERS, WHETHER REASONABLE OR NOT, CONSTITUTE A DEFENSE TO THE CHARGE OF STRIKING?

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The text of these and other relevant statutes is found in an Appendix, which has been separately filed concurrently with this Petition.

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OPINIONS BELOW

To the best of counsel's knowledge, the Decisions of the Presiding Officials of the Merit Systems Protection Board ("MSPB" or "Board") (Appendix "G") and the Opinions of the MSPB (Appendix "H") are unreported. The consolidated opinion

of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") (Appendix "I") has not yet been reported.

JURISDICTION

The judgment of the Federal Circuit in case nos. 85-1128, 85-1129, 85-1130, 85-1131 and 85-1132 was rendered and entered on August 30, 1985. A Petition for Rehearing was filed in each case and, on October 17, 1985, it was denied as to each case.

This Court has jurisdiction over this consolidated Petition for Writ of Certiorari pursuant to Title 28 U.S.C. section 1254(1).

STATEMENT OF THE CASE

Petitioners request Supreme Court review of the August 30, 1985 decision of the Federal Circuit, which affirmed

decisions made by the MSPB sustaining Petitioners' removal from their positions as air traffic control specialists. The MSPB had affirmed [1] the decision of the Department of Transportation, Federal Aviation Administration ("FAA") to remove the controllers.[2]

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1 On September 30, 1983, the Board sustained a decision to remove Ronald E. Oswill, and William M. Hetherington. On January 19, 1984, in separate opinions, the Board sustained a decision to remove Robert E. Henry, Daniel G. Houlihan and William S. Russell.

2 Ronald Oswill's removal was effective August 31, 1981 and the ruling of the Board's Presiding Official was made after testimony taken at hearings held November 5, 1982, November 23, 1982 and November 30, 1982. William M. Hetherington's removal was effective August 31, 1981 and the ruling of the Presiding Official was made after testimony was taken at hearings held November 5, 1982 and November 23, 1982. William S. Russell's removal was effective August 28, 1981 and the ruling of the Presiding Official was made after testimony taken

(footnote continued on next page)

Four of these five controllers had held their positions between eight and ten years while one had been employed for two years.[3] During their tenure as controllers, each repeatedly was lauded by his superiors for exemplary performance and promoted to more advanced job assignments.

During the period of Petitioners' employment, the Professional Air Traffic Controllers Organization ("PATCO") grew

(footnote 2 continued)
at hearings held November 1, 1982 and November 5, 1982. Daniel J. Houlihan's removal was effective August 28, 1981 and the ruling of the Presiding Official was made after testimony taken at hearings held November 5, 1982 and December 2, 1982. Robert Henry's removal was effective August 28, 1981 and the ruling of the Presiding Official was made after testimony taken at hearings held November 2, 1982 and December 2, 1982.

3 The facts set forth in this Statement of the Case are drawn from the briefs filed in each of the five consolidated cases. Those briefs were supported by citations to the respective records. Accordingly, in the interests of brevity and space, citations are not included except in the case of particularly significant facts.

in importance as a bargaining agent and advocate of management reform for all controllers. Throughout the nation many controllers and their supervisors became ardent union activists and placed great pressure upon other controllers, including each Petitioner, to join PATCO. Those PATCO representatives made it very clear to Petitioners that further promotion as a controller and the necessary cooperation of co-workers in the control tower was contingent upon Petitioners' joining and supporting the union.

To each of these Petitioners, those threats were very real. The job of controller requires extremely close cooperation with other controllers in the tower. For example, a controller may not allow a plane under his control to enter the air space of another controller, as he often must, without the other controller's consent. A

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controller who does not work well with his associates could not, therefore, adequately and safely do his job.

As early as the spring of 1981, the pressure from supervisors and controllers loyal to PATCO was intensified and directed toward inducing other controllers, including each Petitioner, to support the impending work action. Petitioners justifiably feared various degrees of physical violence against themselves and their families if they did not join the strikers. In four of the five cases (the exception being the case of William S. Russell) direct physical threats were made.[4]

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4 For example, William M. Hetherington was told by a PATCO loyalist that he would blow up Petitioner's home if he failed to support the strike. (R.T. [11/23] at 106, 117, App. at 3-5, 10-12) Daniel J. Houlihan was repeatedly warned that he would be physically injured if he crossed the picket line and one ardent PATCO supporter threatened to shoot him. (R.T. [12/2] at 56-59, 72,

(footnote continued on next page)

On August 3, 1981, a work action was called by Robert Poli, the President of PATCO. While none of the Petitioners supported the work action, they each feared for their lives and the safety of their families as well as for their ability to safely and competently perform as controllers in the future if they attempted to defy PATCO. Accordingly, each Petitioner declined to report to work for several days.

On August 3, 1981, the FAA took the

(footnote 4 continued)
App. at 4-8, 10-11, 12-13, 15) In addition to receiving direct threats, Ronald E. Oswill was pushed and shoved while at his tower position and frightened by vandalism in his neighborhood which he feared was directed at his family. (R.T. [11/30] at 144, App. at 2-8, 21-25) These and other instances of threats were well documented in each of Petitioner's Briefs to the Court of Appeals for the Federal Circuit. (Note: The numbers in the brackets above refer to the dates of the hearings described in footnote 2, supra. "App." in this footnote refers to the Appendix filed with each Petitioner's opening brief to the Federal Circuit.)

position that any controller who did not report to work within 48 hours would be terminated.

Between August 5 and August 12, 1981, each Petitioner received a form letter from the FAA advising him that the FAA intended to remove him from his position as a controller for having participated in the strike and having been absent without leave. Between August 21 and August 28, 1981, each Petitioner received another form letter from the FAA advising him that he was removed from employment for the reasons articulated in the earlier FAA letter.

The officials who dispatched the proposal and removal letters testified at the MSPB hearings that because a nationwide strike had been called and each Petitioner was absent during that period, the officials believed each Petitioner had engaged in a strike.

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None of the officials considered probative the substantial evidence of coercion which was suffered by Petitioners and which resulted in their AWOL status. Nor did the officials consider probative the fact that none of the Petitioners had ever advised anyone that they affirmatively supported the work action or that they intended to act "in concert" with others in withholding their services from the FAA.

After the MSPB rejected a host of arguments made by Petitioners, counsel for the controllers studied the MSPB decisions and ultimately decided that only one issue merited review by the Court of Appeals for the Federal Circuit, namely, whether the FAA failed to meet its burden of establishing by a preponderance of the evidence that Petitioners had participated in a strike.[5] That issue was fully briefed and formed the basis of each Petition-

er's appeal to the Federal Circuit.

After considering the briefs and hearing oral argument, the Federal Circuit consolidated the five cases into one opinion and, in a paragraph devoted to each Petitioner, summarily affirmed the decisions of the MSPB.

In addition, in each of the five appeals, the Federal Circuit imposed sanctions of $500.00 against Petitioners and counsel, jointly and severally, because "the arguments of the Petitioner are adequately met by precedents in lead cases and/or are patently frivolous . . ." (Appendix "I".)

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5 In Notices of Appeal filed in these cases, several issues were designated for review but subsequently deleted by counsel from briefing and consideration by the Federal Circuit because counsel determined that the "lead cases" had disposed of those issues. Additionally, counsel determined that the cases of only five of the six controllers he represented contained issues which warranted review by the Federal Circuit. See Petition for Rehearing and Suggestion for Rehearing in Banc ("Petition for Rehearing").

This order came as quite a shock to Petitioners and their counsel, the Law Office of Mark E. Beck, A Professional Corporation.[6] Counsel had begun representing six fired air traffic controllers in February, 1983 and had done so at a substantially reduced fee based upon a conviction that the controllers' issues were important and needed to be heard. It was no surprise to Petitioners and counsel that Petitioners' claims were rejected at the MSPB level, given the subtlety of the issues involved and the volume of air traffic controller cases before that body. Therefore, the controllers and their counsel looked forward to review of their cases by an Article III court, expecting in such proceedings a careful and discriminating review of the merits of each case.

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6 Petitioners' Petitions for Rehearing, each supported by the Declaration of Mark E. Beck, provide the principal basis for the remaining facts set forth in this Statement of the Case.

Although approximately 12,000 air traffic controllers had been fired, the Federal Circuit apparently felt that ten "lead cases" (which were decided months before all other controller appeals) would provide sufficient precedent to adequately address all possible issues in air traffic controller litigation. In preparation for review by the Federal Circuit, counsel invested many hours studying each of those "lead cases" and applying the law and facts of those cases to the cases of the six controllers whom counsel represented. Only two of the "lead cases" addressed the issue of coercion (Johnson and Martel)[7] and only three such cases analyzed the "in concert" element of a charge of striking. (Schapansky, Letenyei and

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7 Johnson v. Department of Transportation, 735 F. 2d 510 (Fed. Cir. 1984); Martel v. Department of Transportation FAA, 735 F. 2d 504 (Fed. Cir. 1984).

Johnson).[8] Moreover, those relevant cases contained material facts distinguishing them from each of Petitioners' cases. This is not surprising, of course, because defenses of coercion or failure to act "in concert" with others inherently depend upon a set of facts unique to each Petitioner.

Having invested considerable time and effort in determining which issues were not precluded by "lead cases" and in considering how to present those issues as persuasively as possible, counsel for Petitioners was surprised to receive three form letters from the clerk of the Federal Circuit -- two even before opening briefs were ever filed -- warning that sanctions would be imposed for frivolous prosecution of appeals. (See Appendix "F.") Counsel nevertheless

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8 Schapansky v. Department of Transportation, FAA, 735 F. 2d 477 (Fed. Cir. 1984); Letenyei v. Department of Transportation, FAA, 735 F. 2d 528 (Fed. Cir. 1984); Johnson, supra, Footnote 7.

remained convinced, based on professional judgment and litigation experience, that the appeals were meritorious.

First, simply put, counsel could not understand how appeals asserting defenses based upon unique sets of facts could be deemed frivolous when the specific facts at issue had not been considered previously by the Federal Circuit.

Second, the relief sought by Petitioners was substantial, not frivolous or insignificant. A favorable disposition of Petitioners' claims would have resulted in reinstatement to their positions as air traffic controllers.

Third, the "lead cases" and sanctions cases to which the clerk of the court referred in its letters clearly were distinguishable from Petitioners' cases. (See Petitioners' Opening Briefs, Reply Briefs and Petitions for Rehearing.)

Fourth, counsel reasonably believed that Petitioners' arguments had substantial merit because many of them remained unaddressed or were only superficially treated by the FAA's boilerplate responsive briefs.

Finally, when the appeals were scheduled for oral argument, counsel was further convinced that the decision to proceed with the appeals was correct. Counsel was aware that argument was not permitted in the Federal Circuit when an appeal was deemed frivolous (Appendix "D" & "E") and a telephone call to the office of the clerk of the court had confirmed that only some air traffic controller appeals, those presumably more meritorious, were being set for argument.

Based on the foregoing, counsel, in good faith, decided to continue prosecuting the appeals with the Federal Circuit. Petitioners and counsel stand by

that decision today and seek certiorari to vindicate that decision and the controllers' rights to their jobs.

STATEMENT OF REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

There are three compelling reasons why the Supreme Court of the United States should grant certiorari in the consolidated cases of William S. Russell, et al. v. Department of Transportation, FAA (Court of Appeal Nos. 85-1128, 85-1129, 85-1130, 85-1131 and 85-1132).

1. The imposition of sanctions is simply outrageous because the arguments of the Petitioners were in no way frivolous or adequately met by the precedents of lead cases. Out of the ten lead air traffic controller cases only two even addressed the crucial defense of coercion which each Petitioner presented on appeal to show he did not stay home voluntarily. Further,

only three of the cases analyzed the "in concert" element that is necessary to sustain a charge that Petitioner had the requisite intent to strike.

Petitioners were confident their appeals were proper because the very facts found lacking in both Johnson and Martel were present in each Petitioner's case. Johnson, supra, 735 F. 2d at 513; Martel. supra, 735 F. 2d at 509-510. Specifically, whereas Johnson presented only vague or overheard threats of violence and Martel apparently presented no such evidence at all, each Petitioner presented evidence of specific threats of violence made directly to him and his family or similarly dramatic testimony.[9]

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9 Although Petitioner Russell received no direct threats of violence, both he and his psychiatrist presented strong objective evidence of the overwhelming fear which Russell suffered.

Additionally, the court in Martel specifically left open "the possibility that an employee's participation in the strike may be rendered involuntary, in certain exceptional circumstances involving threats of harm of a non-physical nature." 735 F. 2d at 509, n. 9. Each Petitioner presented compelling evidence of anxiety that he would never be able to safely do his job if he did not support the PATCO work action. Moreover, counsel for Petitioners compellingly demonstrated that the anxiety each Petitioner felt was more reasonable than that appearing in either Martel or Johnson.

Petitioners similarly distinguished Schapansky and Lentenyei in contending that a genuine fear of harm sufficed to negate a prima facie case of striking because each Petitioner lacked the requisite intent to withhold his ser-

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vices "in concert" with others. (See Petitioners' Opening Briefs.)

Even assuming, arguendo, the Federal Circuit decided correctly in each instance that the specific fact situations did not constitute a defense of coercion or lack of intent to strike, the Federal Circuit nevertheless erred in deciding these appeals were frivolous. No other circuit has suggested that sanctions are appropriate merely because a prior case deals with a similar fact situation and a similar issue.[10] Moreover, the Federal Circuit itself has indicated that such a standard is patently unfair to both attorneys and clients. See, e.g., Connell v. Sears, 742 F.2d. 1542, 1554

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10 See, for example, Beecher v. Able, 575 F.2d 1010 (2nd Circuit 1978); Lichtenstein v. Lichtenstein, 481 F.2d 682, (3rd Circuit 1973) cert. denied 945 S.Ct. 895 414 U.S. 1144, 39 L.Ed. 2d 98;

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(Fed. Cir. 1983) (holding it is proper to argue that even overwhelming contrary precedents should be overruled or distinguished).

Sanctions also were inappropriate because there is not a shred of evidence that suggests any of these Petitioners were not pursuing their appeals in good faith. Each had an extremely compelling reason to put his grievance before an Article III court, namely, to regain his position as an air traffic controller, a challenging occupation at which each of the appellants excelled for years.

Thus, the imposition of sanctions in this case is truly a miscarriage of justice. Petitioners and their counsel

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(footnote 10 continued)
Dow Chemical v. M/V Gulf Seas, 593 F.2d 613 (5th Circuit 1979); Ruderer v. Fines, 614 F.2d 1128 (7th Circuit, 1980); Underwood v. Jefferson Memorial Hospital, 639 F.2d 455 (8th Circuit 1981); and National Labor Relations Board v. Catalina Yachts, 679 F.2d 180 (9th Circuit 1982).

have been unfairly punished for, respectively, exercising their First Amendment right to petition for a redress of grievances [11] and carrying out a professional duty to zealously represent one's clients.[12]

2. The danger of allowing the Federal Circuit decision to stand here goes beyond the injustice done to these five Petitioners and counsel. The standard employed by the Federal Circuit

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11 The right to petition for redress of grievances and the right to obtain meaningful access to the courts are inherent in the First Amendment. See United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 221, 19 L.Ed. 2d 426, 430, 88 S.Ct. 353 (1967); United Transportation Union v. Michigan, 401 U.S. 576, 585, 28 L.Ed. 2d 339, 347, 91 S.Ct. 1076 (1971).

12 (See ABA Model Code of Professional Responsibility, Canon 7, EC 7-1, EC 7-2, EC 7-4, EC 7-19, DR 7-101, and DR 7-102.)

in assessing sanctions was so vague that it poses the grave threat of chilling the zealous advocacy of counsel. Additionally, the very real effect of this threat poses the unwarranted risk that the First Amendment right to petition for redress of grievances and the right to obtain meaningful access to the courts will become a hollow promise.

It is important that sufficient guidelines exist to permit attorneys to competently assess whether a particular appeal is frivolous or not. The Federal Circuit decision to sanction here serves only to muddy the waters of this rapidly developing area of the law.

The risk incurred by allowing the Federal Circuit decision to stand in this case is a grave one. In cases which contain complex issues and in which a substantial body of common law already exists, attorneys unfairly will be forced to choose between their duty

to zealously represent their client, and their desire to avoid sanctions by the court. Petitioners and their counsel recognize that a proper balance must be struck between these interests. However, it will be virtually impossible for the individual attorney to strike the balance given the impermissibly vague standard used here by the Federal Circuit.

Similarly, the vague standard employed by the Federal Circuit unfairly forces individuals to choose between risking the wrath of the court by exercising their First Amendment rights, and acquiescing in the deprivation of their rights or infringement of their interests.

Petitioners respectfully contend that these dilemmas pose an important question of federal law which the United States Supreme Court can resolve by

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providing definitive guidelines as to what constitutes a frivolous appeal.

3. Certiorari is also appropriate in these cases because it is imperative the Supreme Court of the United States rule, for the first time, upon a significant issue of law, namely: if a government employee experiences a genuine fear of harm to himself, his family members and his career, and based upon that fear absents himself from work during a strike, does his fear support a defense to a charge of striking?

In each of the five consolidated cases, Petitioners were absent from work because they feared if they reported to work during the strike called by PATCO, they would endanger themselves, their families and their careers. These Petitioners did not want to strike. The fact that they were threatened on many

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occasions indicates the extent of the reservations each had.

As such, Petitioners contend that under applicable law of the Federal Circuit they were reasonably afraid, were coerced into absenting themselves from work and, therefore, were not striking. Johnson, supra; Martel, supra.[13]

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13 The decision of the Federal Circuit summarily dismissed each Petitioner's claim by devoting one paragraph each to the issue of coercion. Petitioners respectfully submit this was utterly unsatisfactory, given the time and effort spent distinguishing each of Petitioners' cases from that of the lead cases. For example, the Federal Circuit concluded, without explanation, that Petitioner Houlihan received no direct threats. This is so despite the fact Petitioner Houlihan testified he received threats of physical violence (R.T. [12/2] 56-59, App. 4-8, 10-13, 15) including a specific threat that he might get shot if he went back to work. (R.T. [12/2] 56, 59). Another example is found in Petitioner Hetherington's case. The Federal Circuit merely asserted that Hetherington's argument on coercion lacked specifics and was fully met by the Board's opinion. However, Hetherington testified concerning

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Petitioners also contend that even if, arguendo, their fears were not reasonable, the genuineness of these fears sufficed to negate the "in concert" element of a charge of striking. See Johnson, supra, 735 F. 2d at 533.

In short, if the law is to be in accord with reality and simple fair play, this Court must recognize a distinction between those who voluntarily participate in an illegal strike and those, such as Petitioners, who wish to report to work, but fear the onerous consequences of defying the ardent supporters of PATCO.

(footnote 13 continued)
physical threats that ardent PATCO supporters made, including a bomb threat (R.T. [11/23] 66, 106, 117, App. 3-5, 7-12) and the very person who made the bomb threat testified he had made such a threat. In fact, counsel devoted six pages of Petitioner's opening brief before the Federal Circuit addressing the inadequate coercion analysis on which the Board relied in Hetherington's case. These two examples serve to highlight the fact that these individuals have not yet received a meaningful hearing of their grievances.

The Supreme Court of the United States, to Petitioners' knowledge, has not yet decided under what conditions fear, whether reasonable or not, can constitute a defense to a charge of striking. It is submitted that, given the facts and arguments presented, these consolidated cases are an ideal vehicle for this Court to clarify this area of the law.

Dated: January 15, 1986

By: MARK E. BECK

MARK E. BECK

CERTIFICATE OF MAILING

I hereby certify that on this date I have placed in the United States mail, postage prepaid, a true copy of the above document addressed as follows:

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